No. 91-329

1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RONALD W. ROSENBERGER, *et al.*,
Petitioners,

v.

THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

Having argued at every stage of this litigation (including its opposition to certiorari) that extending SAF funding to *Wide Awake* magazine would violate the Establishment Clause, and having prevailed on that argument in the court below, the University now abandons the argument in its brief on the merits. Resp. Br. 27 & n.17. The University leaves to its assorted *amici curiae* the task of addressing the question on which this Court granted certiorari. Instead, the University presents an alternative ground for affirmance: that the Fourth Circuit erred in holding that its discrimination between religious and secular viewpoints "violates the Speech and Press Clause" (Pet. App. 34a). We will turn first to the University's argument, and then to the *amici*'s arguments for affirmance on the Establishment Clause issue.

I. THE FOURTH CIRCUIT CORRECTLY CONCLUDED THAT A PUBLIC UNIVERSITY MAY NOT DENY FUNDING TO AN OTHERWISE ELIGIBLE STUDENT PUBLICATION ON THE BASIS OF ITS EDITORIAL VIEWPOINT

1. The University begins the "Argument" section of its brief with an 11-page attack on a straw man: "The First Amendment does not forbid reasonable content distinctions in the distribution of public funds." Resp. Br. 12.

> In the context of a public university, virtually every allocation of funds involves speech. The selection of courses for the curriculum, the provision of support for research, and the hiring and promotion of professors are obvious examples. If the First Amendment were construed to demand content-neutrality in funding, routine decisions would invite a lawsuit.

Resp. Br. 14-15. Warming to its theme, the University warns that a contrary holding would become "a judicial juggernaut" (*id.* at 16), subjecting "[e]veryday academic determinations * * * [to] judicial review" under a "compelling interest" test. *Id.* at 15.

The short answer to this is that petitioners have argued no such thing. It is not our position that heightened judicial scrutiny should apply to the *government's own speech*—including a university's curricular decisions. Rather, as we explained in our opening brief (at 25-29), there is a fundamental distinction, for purposes of both the Free Speech and the Religion Clauses, between government speech (including the University's curricular decisions) and private speech. This distinction, ignored by the University, is well established in this Court's precedents. See *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U.S. 260, 267, 271-72 (1988) (distinguishing between student newspapers that are part of the public school curriculum and private activities of students); *Waters* v. *Churchill*, 114 S. Ct. 1878, 1886-88 (1994) (explaining difference in government's latitude to control the speech of its employees and agents, as opposed to the private speech of private individuals); *Board of Education* v. *Mergens*, 496 U.S. 226, 250 (1990) (distinguishing between "*government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect") (emphasis in original); see generally Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech By Private Speakers*, 81 Nw. U. L. Rev. 1 (1986). We showed in our opening brief (at 27) that under the University's own Guidelines and Contract with CIOs, student groups receiving SAF funds are *not* agents or employees of the University, are *not* part of the curriculum, are *not* under the control of the University, and thus plainly fall on the "private" rather than the "governmental" side of this fundamental line. The University does not challenge this conclusion and, in light of its own explicit statements and policies regarding CIOs (see J.A. 26-29), it cannot.

Even with regard to government benefits to private speakers, it is *not* our position that all "content discrimination" triggers strict scrutiny. We do not question the discretion of the University, if it chooses, to fund poetry magazines and not comic books, science journals and not

history journals. This case is not about mere content discrimination; it is about viewpoint discrimination. Our position is that insofar as a public institution undertakes to subsidize a particular category of expression (in this case, "student news, information, opinion, entertainment, or academic communications media groups" (Pet. App. 61a, ¶ 4)), it may not single out a particular viewpoint or viewpoints within that category for discriminatory exclusion.

Indeed, the University does not disagree with us (or the Fourth Circuit) about this legal principle, as a careful reading of the footnotes in the University's brief reveals. Resp. Br. 16 n.10. The University concedes that it may not deny funds to an otherwise eligible student group on the basis of "viewpoint discrimination." *Ibid.* It endorses the holdings of the lower court cases on which we rely: *Gay & Lesbian Students Ass'n* v. *Gohn*, 850 F.2d 361 (8th Cir. 1988), and *Joyner* v. *Whiting*, 477 F.2d 456 (4th Cir. 1973), which held that a public university could not deny funding to a gay rights group (*Gohn*) or a newspaper advocating black separatism (*Joyner*).[1]

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[1] We note that the University's paraphrases of the courts' holdings regarding viewpoint discrimination are couched in restrictive adjectives and adverbs that do not appear in the cases. It describes the discrimination in *Gohn* as "blatant viewpoint discrimination based on discriminatory animus toward homosexuals." Resp. Br. 16 n.10. It describes *Joyner* as "a clear case of ideologically driven viewpoint discrimination." *Ibid.* To the extent that it is suggesting that viewpoint discrimination is permissble unless it is "blatant," "ideologically driven," or "based on discriminatory animus," the University is mistaken.

Neither in *Lamb's Chapel* nor in any other viewpoint discrimination case has this Court insisted on evidence of discriminatory animus. See *Simon & Schuster* v. *New York Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (plaintiff asserting free speech claim based on content or viewpoint discrimination is not required to prove "improper censorial motive"); accord, *Leathers* v. *Medlock*, 499 U.S. 439, 446 (1991). And subtle as well as "blatant" forms of viewpoint discrimination are unconstitutional. *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2547-48 (1992).

In its Brief in Opposition at the certiorari stage (at 15), the University stated flatly, without qualification, that "public universi-

Since the University does not seriously dispute the proposition that viewpoint discrimination is forbidden in the context of funding, as well as of facilities (Resp. Br. 16 n.10), it is unnecessary to respond in detail to its lengthy discussion of *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), and *Rust* v. *Sullivan*, 500 U.S. 173 (1991). Both cases reaffirm the proposition that the government may not discriminate on the basis of viewpoint in the distribution of public funds; both cases were decided on the ground that the programs involved did not involve viewpoint discrimination. *Regan*, 461 U.S. at 548; *Rust*, 500 U.S. at 193, 194. Indeed, *Regan* did not even involve content-based discrimination, but only speaker-based discrimination. *Regan*, 461 U.S. at 548 ("the veterans' organizations that qualify under § 501 (c)(19) are entitled to receive tax-deductible contributions regardless of the content of any speech they may use"). Cf. *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2466-67 (1994).

Rust is particularly inapposite to this case. In *Rust*, the government did not distribute subsidies to a broad range of private speakers without regard to the content of their speech. Rather, the grantees under Title X were specifically selected to carry out specific governmental services, including support for family planning. This was the government's own message. As we explained in our opening brief (at 28), when the government distributes funds to grantees for dissemination of the government's message, it is entitled to impose reasonable restrictions on the use of those funds, so that its message is not diluted or obscured by inconsistent or distracting messages from the grantee. This bears no resemblance to the SAF program, in which the University provides a general subsidy to a broad range of speakers to promulgate messages of their own choosing, and expressly disavows any association with the content of their speech. See J.A. 26.

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ties may not deny funding to student groups or publications on the basis of their viewpoint." Indeed, the University described this principle as "obvious." *Ibid.*

In sum, the first section of the University's brief is essentially irrelevant. The parties agree that viewpoint discrimination is presumptively invalid in the context of government funding of private speech. That is what this case is about.

2. The third section of respondents' brief (at 29-34) adds nothing to this analysis. Even assuming that the "public forum" doctrine applies to the free speech issue in this case, it is common ground that no matter what kind of forum is involved, the government may not engage in viewpoint-based discrimination. As the Seventh Circuit recently explained in *Hedges* v. *Wauconda Community School Dist.*, 9 F.3d 1295, 1297-98 (7th Cir. 1993), rejecting an argument similar to the University's:

> The first amendment's ban on discriminating against religious speech does not depend on whether the school is a "public forum" and, if so, what kind * * *. Even when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint. Especially not on account of a religious subject matter, which the free exercise clause of the first amendment singles out for protection.

Thus, depending on the nature of the forum, the government may be able to limit speech to certain categories, but it does not have the authority to discriminate against particular viewpoints within those categories. *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811-13 (1985); *Perry Education Ass'n* v. *Perry Local Educators Ass'n*, 460 U.S. 37, 49 (1983).

3. The University's argument therefore rests entirely on the second section of its brief (at 22-29), which makes the rather desperate argument that discrimination against publications on the basis of their religious editorial perspective is not viewpoint discriminaton. That argument is contrary to both common sense and clear precedent.[2]

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[2] Even if this were "mere" content discrimination, it is far from obvious that it is "reasonable" for the University to discriminate against religious speech when it allows secular and even anti-

a. The University's claim that it is not engaged in viewpoint discrimination is, to say the least, counter-intuitive. A black separatist newspaper has a constitutionally protected right to express its views on the subject of racism (as held in *Joyner*, which the University concedes is correctly decided), but *Wide Awake* forfeits its right to funding if it expresses its views on the same subject (see "A Simple Answer to Racism," *Wide Awake*, Nov./Dec. 1990, at 12). A gay rights group has a constitutionally protected right to express its views on a subject like "Homosexuals: Can They Change . . . And Should They?", *Wide Awake*, Mar./Apr. 1991, at 14 (as held in *Gohn*, which the University concedes is correctly decided), but *Wide Awake* does not. If this is not discrimination on the basis of viewpoint, we do not know what is.

In the Guidelines, the Rector and Visitors determined that certain student activities "relate to the educational purpose of the University and thus are eligible for funding." Pet. App. 61a. Among these are "student news, information, opinion, entertainment, or academic communications media groups." *Ibid.* The University evidently considers student publications worthy of support because the experience of writing and communicating ideas is educationally valuable in itself, independent of the nature of those ideas, since the University places no restrictions on content (other than the "religious activities" limitation). Sometimes debate in a college environment gets pretty crazy, and the University surely would not say that all of the ideas and opinions expressed by funded groups are "educational" in the sense of being well-reasoned or well-informed. The educational value is in "exposing the student body to various points of view on significant issues." *Arrington* v. *Taylor*, 380 F. Supp. 1348, 1362-63 (M.D.N.C. 1974), *aff'd*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976).

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religious speech on the same subjects. J.A. 38, ¶ 16. See *Widmar* v. *Vincent*, 454 U.S. 263, 281 (1981) (Stevens, J., concurring).

Wide Awake is unquestionably a "student news, information, opinion, entertainment, or academic communications media group." It addresses issues not unlike those addressed by other student publications: racism, books and music, the views and experiences of professors, educational issues, homosexuality, eating disorders, fear of flying, crisis pregnancies, and the like. There is no reason to think that the students who write and edit this publication, or those who read it and debate its contents, are receiving any less educational benefit than those who write, edit, and read publications that have a different editorial slant. Some may be better written, more sophisticated or erudite; some are plainly less so. But the University does not purport to make the funding decision on grounds of journalistic quality. The sole reason for exclusion of *Wide Awake* was its religious point of view.

b. The University does not purport to exclude the *subject matter* of religion from funded publications. (An entire issue of one funded magazine, *Thoughtlines*, was devoted to "Faith and Reason.") The Guideline against "religious activities" is framed not in terms of subject matter but of opinion or belief. See Pet. App. 66a ("religious activit[ies]" are those "which primarily promote[] or manifest[] a particular belief(s) in or about a deity or an ultimate reality"). Indeed, if the restriction were framed in terms of religious subject matter, it might not even apply to *Wide Awake*. Most of the articles in *Wide Awake* are not *about* religion, but present a religious *perspective* on a variety of subjects (racism, eating disorders, etc.). See Pet. Br. 6-7.

c. The University's argument that the exclusion of religious activities is not viewpoint discrimination is foreclosed by this Court's unanimous decision in *Lamb's Chapel* v. *Center Moriches School Dist.*, 113 S. Ct. 2141 (1993), which explicitly held that the exclusion of "religious purposes" is "based on viewpoint." *Id.* at 2149. See also *id.* at 2147 ("That all religions and all uses for religious purposes are treated alike * * * does not answer the critical question whether it discriminates on the basis

of viewpoint to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint"); *ibid.* (stating that denial of permission to exhibit film on ground that "the presentation would have been from a religious perspective" is "plainly invalid" viewpoint discrimination). The University Guidelines here are identical in form and substance to the regulations invalidated in *Lamb's Chapel.* See Note, 108 Harv. L. Rev. 507, 510 n.25 (1994) (analyzing this case under *Lamb's Chapel*).

In a footnote (at 24 n.13), the University attempts to distinguish *Lamb's Chapel* on the ground that it "involved access to school facilities" rather than funding. See also Resp. Br. 14. But that distinction is irrelevant to the underlying question of whether the exclusion of religious activities constitutes viewpoint discrimination. The University concedes (*id.* at 16 n.10) that viewpoint discrimination is forbidden in the context of funding as well as facilities. The significant holding of *Lamb's Chapel* for present purposes is that the exclusion of an otherwise eligible organization on account of its "religious purpose" or "perspective" constitutes viewpoint discrimination. To that, the University has no answer.

d. Given the inherent implausibility of the University's argument and its inconsistency with *Lamb's Chapel*, one would expect the University to provide at least a clear logical argument in support of its position. But the only argument we can discern is that the prohibition on "religious activities" cannot be a viewpoint-based category because the various religious faiths do not "embody a common view or perspective." Resp. Br. 23; see also *ibid.* ("Of course, respondents do not deny that religious activities encompass particular views and beliefs, * * * [b]ut only by retreating to a level of vacuous generality can one assert that all religious activities * * * reflect the *same* view or perspective.") (emphasis in original).

No one claims that all religions have the "*same* view or perspective." The genus "religion" obviously has many

species. But the government may not discriminatorily exclude groups or families of viewpoints from otherwise available general benefits, any more than it could exclude a single viewpoint (if there is any such thing as a single viewpoint). The term "Marxist" includes such disparate perspectives as democratic socialists, Maoists, and Trotskyists—but no one would say that the exclusion of "Marxist activities" would be anything other than viewpoint discrimination.

e. Finally, the University supports its argument by invoking the slippery slope. If viewpoint discrimination against religious speakers is impermissible, the University says, then various limitations embodied in federal statutes would be unconstitutional. Resp. Br. 25-26. Without knowing more about these programs, we are not sure whether they embody viewpoint discrimination or not. The question in each instance is whether the government is excluding otherwise eligible participants from a program on the basis of their religious orientation, while allowing similarly situated participants to espouse secular ideological or philosophical viewpoints. We doubt that the University's examples are of that type—but if they are, we stick by our argument.

4. In one important respect, the University's argument is extremely misleading. The Argument section of its brief begins with the statement that "[t]his case is not specifically about religion" (Resp. Br. 12), notes that certain other categories of activity (in addition to "religious activities") are excluded from eligibility for funding, and then states that "[t]he same constitutional issue would be raised, regardless of whether the activity excluded from funding were religious, political, philanthropic, or social." *Id.* at 13. This is simply not true.

Most of the excluded categories have nothing to do with viewpoint, or even with speech content. Philanthropic organizations and fraternities and sororities are defined by what they do and who they are—not by what they say. An otherwise eligible student newspaper would not lose its funding eligibility because it advocated philan-

thropy or addressed campus issues from a "Greek" point of view.

The only other provision of the Guidelines that has any relation to viewpoint is the prohibition on "political activities." The University conveniently fails to mention that the definition of "political activities" in the Guidelines expressly precludes application to "any otherwise eligible student organization which * * * espouses particular positions or ideological viewpoints, including those that may be unpopular or are not generally accepted." Pet. App. 66a.[3] This shows that—contrary to the University's assertions—religious viewpoints are *not* treated in the same way as political viewpoints (let alone "philanthropic" or "social" viewpoints). An otherwise eligible student publication will be denied funding if its viewpoint is "religious," but not if its viewpoint is "political."

Indeed, one way for the University to conform its Guidelines to the dictates of the First Amendment (as petitioners see them) would be to amend the definition of "religious activities" to make it parallel to the definition of "political activities," as follows:

> These restrictions on funding religious activities are not intended to preclude funding of any otherwise eligible student organization which espouses particular positions or religious viewpoints, including those that may be unpopular or are not generally accepted.

All we ask is that religious viewpoints be given the same treatment as other political, ideological, or philosophical points of view.

5. Toward the end of its brief (at 28), the University argues that "the Establishment Clause settles the constitutional *permissibility* of financial disengagement from religion"—even if it does not *require* the University to exclude religious viewpoints. This seems to us an especially

[3] The "political activities" prohibition applies only to lobbying on specific legislation and electioneering on behalf of candidates for public office. Pet. App. 65a. It does not apply to editorial perspectives of student publications.

pernicious notion. Since it would not be cabined by the *actual* dictates of the Establishment Clause, such a principle would allow the government to discriminate against religious speakers and citizens virtually at will in any matter with "financial" implictions—justifying its discrimination by appeal to undefined notions of disestablishment. But the Establishment Clause (like the rest of the First Amendment) was designed to *restrict* the powers of government in the field of religion. It would be ironic indeed if it were read as a license to governments to invade what would otherwise be the First Amendment rights of religious citizens.

This Court has repeatedly rejected arguments that the government should be given latitude to invade free speech or free exercise rights in order to "achiev[e] greater separation of church and State" than is required by the Establishment Clause. *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981). In each of the cases in which the free speech rights of religious speakers were pitted against the supposed strictures of separation between church and state—*Widmar*, *Mergens*, and *Lamb's Chapel*—this Court examined whether the exclusion was required by the Establishment Clause, and upon concluding that it was not, enforced the free speech rights of the religious speakers. In no case did the Court suggest that the Establishment Clause creates a discretionary zone in which the government is free to discriminate against religious speakers.

6. We end where the University begins (Resp. Br. 1-11): with the funding of the Muslim Students Association, the Jewish Law Students Association, and other seemingly religious student activities. Contrary to the University's characterization of the procedural history of this case (at 1-5), petitioners' argument based on these facts has never been confined to the Equal Protection Clause. Rather, throughout this litigation, we have maintained that each of the relevant constitutional provisions (speech, press, free exercise, equal protection, and establishment) is offended *both* by discrimination among religious *and* by discrimination between religion and nonreligion. Nor have we divided our argument into a "facial

challenge" and an "as applied" challenge. Rather, our contention has been that the line between "religious" and other (including "cultural") activities is inherently arbitrary, that it is highly susceptible to discriminatory application, that its enforcement creates an excessive entanglement between church and state, and that it has in fact produced discrimination among religious groups at the University. The only response we have received from the lower courts to these arguments is that we have not proven "discriminatory intent." Our response, all along, has been that there is no requirement of proof of discriminatory intent under the claims we have raised.

We stand by all these arguments. They are fully supported by the record. The University struggles mightily to show why the funded activities are not as "religious" as *Wide Awake*. See, *e.g.*, Resp. Br. 9 n.4. We see these differences as bearing more on style than on religiosity; Scottish Presbyterians are not less "religious" than Pentecostals just because they are more restrained and taciturn. But the point here is not whether the University is right or wrong. It is whether such lines can be drawn non-arbitrarily, without a degree of surveillance and intrusion that violates the principles of neutrality and nonentanglement.

II. THE ESTABLISHMENT CLAUSE DOES NOT BAR RELIGIOUS SPEAKERS FROM PUBLIC BENEFITS GENERALLY AVAILABLE TO A WIDE ARRAY OF BENEFICIARIES ON AN EQUAL BASIS, WITHOUT REGARD TO RELIGION

For the most part, the University's *amici* on the Establishment Clause issue make arguments anticipated and answered in our opening brief. The arguments center around history, precedent, the meaning of neutrality, and the autonomy of religious organizations. Since we dealt with precedent at length in the opening brief, we will focus here on the other issues.[4]

[4] We must note, however, that virtually all of respondents' *amici*, and respondents themselves (Resp. Br. 27 n.17), treat *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), as the most directly pertinent case. The decision in *Kendrick* is entirely consistent with our understanding of the Establishment Clause. In *Kendrick*, the government did not distribute funds to a wide range of speakers in order to disseminate ideas of their own choosing. Rather, it made a limited number of grants (two per state per year) to organizations thought best able to convey the *government's own message*: namely, the importance of adolescent sexual self-discipline. When the government itself is speaking (whether directly or through private grantees), it is under an obligation not to take sides on religious issues. By contrast, when the government is using its resources to facilitate a broad and diverse array of *private* speech, its obligation is to allow uninhibited, robust debate without viewpoint-based limitations.

1. *Amici* make a great deal of the controversy over religious assessments in Virginia in 1784-85. But they fail to note the vast difference in context and principle between a proposal to impose a tax "for the support of teachers of the Christian religion" and a tax for the support of student newspapers and expressive activities of every conceivable stripe and opinion.[5] They do not point to a single instance in which a participant in the debates during the founding period argued that a generally available public benefit should be denied to any person or group on account of the religious character of their speech. From the proposition that the power of the purse must not be used to favor religion it does not follow that the power of the purse must be used to disfavor religion.

It is telling that Jefferson's statement—"to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sin-

[5] Several *amici* (Americans United Br. 14 n.19; see also Baptist Joint Comm. Br. 7) claim that "Petitioners are incorrect in characterizing the Virginia assessment as benefitting religion solely. Undesignated tax monies would have gone to fund schools." But since the "schools" referred to in the Act were public schools, those who did not pay the religious tithe were, in effect, required to pay extra taxes to the government. They did not have the option of supporting secular (or indeed, non-Christian) speech of their choice.

ful and tyrannical"[6]—did not distinguish between religious and nonreligious opinions. According to Jefferson's principle, it is no less objectionable for the state to force dissenting citizens to pay for animal rights, gay rights, or Federalist Society advocacy than to force them to pay for *Wide Awake*.[7] Thus, there is some logic to the position of *amicus* Pacific Legal Foundation that the entire mandatory student activities fee is unconstitutional insofar as it compels support for controversial political or religious viewpoints. But student activity fee programs of this sort have been uniformly upheld on the theory that they are not supporting any *particular* opinions, but instead foster the exchange of diverse opinions. See cases cited in our opening brief (at 16 n.9). An essential element in this rationale is that the program must be genuinely open to all perspectives of the student body; the University must not skew the debate in any particular direction, whether religious or nonreligious. It seems to us that the Jeffersonian principle is satisfied by funding no one or by funding everyone pursuant to neutral criteria, but is violated when particular viewpoints are singled out for favorable or disfavorable treatment, as they are here.

2. This historical argument is directly related to the *amici*'s theoretical argument about the meaning of neutrality. Petitioners and respondents' *amici* emphatically agree that the government must be neutral toward religion. The dividing issue is this: the *amici* seem to think that the meaning of neutrality is determined by the character of the public benefit in question, while petitioners maintain that the meaning of neutrality depends upon the principle by which the benefit is distributed.

Thus, we maintain that in determining whether distribution of a benefit is "neutral" toward religion, the

[6] Virginia Bill For Establishing Religious Freedom, quoted in Baptist Joint Comm. Br. 3-4.

[7] This Court has frequently cited Jefferson's statement in the context of compelled support for purely secular advocacy. See, *e.g.*, *Keller* v. *State Bar of California*, 496 U.S. 1, 10 (1990); *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234 n.31 (1977).

court must examine the range of eligible beneficiaries under the terms of the program. If the benefit "is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end" (*Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 14-15 (1989)), then the program is neutral; but if religious organizations are singled out for special benefits, or the eligibility criteria are "skewed towards religion" (*Witters* v. *Department of Services*, 474 U.S. 481, 488 (1986)), then the program is not neutral.[8] In making this determination, it does not matter what the public benefit in question may be (tax breaks, police and fire service, access to facilities, tuition tax credits, money for vocational education, bus rides, or whatever). *All* benefits (even meeting rooms) entail some cost to the taxpayer and confer some advantage on the user. Nor does it matter how "religious" the recipient is, so long as it conforms to the neutral, generally applicable terms of the program. *Texas Monthly* involved periodicals no less religious than *Wide Awake*, and *Witters* involved a pervasively sectarian school. *Walz* involved a church. None was required to stifle its religious message as a condition for eligibility.

The *amici*, by contrast, say that the neutrality analysis shifts according to the nature of the benefit in question. Thus, they agree that for some valuable benefits (tax benefits, access to facilities, direct aid to students), the question of neutrality is determined by whether religion is given special preference. But when it comes to other forms of aid (in this case, payments to third parties for printing costs), they say that inclusion of religious speakers would be an unconstitutional "advancement." This line of argument, however, is nothing but incoherent baseline-shifting. *Relative to government inaction*, religious activities are "advanced" whenever they are permitted to share in the fruits of public benefits. But *rela-*

[8] If a program is not neutral toward religion in this sense, it may nonetheless be constitutional as a permissible accommodation of religion. *Texas Monthly*, 489 U.S. at 15; 18 n.8.

tive to the treatment of other speakers, religious speakers are disadvantaged if they are excluded from benefits that are extended to their secular competitors in the marketplace of ideas. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1005-06 (1990). To shift back and forth between these two baselines is a sure recipe for inconsistency, arbitrariness, and incoherence.

None of the *amici* provide any principled reason, grounded in the purposes of the Establishment Clause, for shifting baselines according to the form of aid. One group of *amici* distinguishes between "equal access" and "equal advancement." Baptist Joint Comm. Br. 18. This is purely semantical. Tax benefits and free facilities "advance" the group's objectives, no less effectively than cash. Why is property tax exemption "access" instead of "advancement"? Other briefs rely on nebulous formalisms, labelling various forms of aid "passive," "affirmative," "indirect," "incidental," or the like. Americans United Br. 20-21; ACLU Br. 22-23. These all seem to be variations on the theme that form should dominate over substance.[9]

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[9] The emptiness of these categories is dramatically illustrated by the historical positions of these *amici*, who—making arguments not much different from those they make in this case—in past cases have argued that religious individuals and groups should be excluded from the very forms of aid that they now claim are subject to a constitutional rule of equal access. For example, *amicus* ACLU opposed the constitutionality of neutral property tax exemptions in *Walz; amici* American Jewish Congress and Anti-Defamation League opposed equal access to university facilities in *Widmar; amici* National School Boards Ass'n, Council on Religious Freedom, and ACLU opposed neutral provision of sign language interpreters in *Zobrest*; and *amici* Americans United, ACLU, and Anti-Defamation League opposed equal tuition for vocational education in *Witters*. The lines they draw with such confidence today were different yesterday and may be different tomorrow. The only consistency is that religious speakers and groups end up with less than the full and equal rights accorded to their secular fellow citizens.

Amici do not define these terms, or explain how they differentiate this case from others. For example, the University's *amici* are united in the view that the SAF program is "direct" aid, while the program in *Witters* was "indirect." *E.g.*, ACLU Br. 21-22; Council on Religious Freedom Br. 10. But in both cases, money was provided to eligible persons (there blind persons, here student groups) to pay for specified expenditures (there tuition, here printing costs) for legitimate state purposes (there vocational education, here student newspapers) without regard to the religious, philosophical, or ideological orientation chosen by the recipients. In neither case is the government responsible for the decision to adopt a religious perspective: that decision was left to the individual recipients (in *Witters*) and the editors of the various funded journals (here). In both cases, aid is "indirect" or "incidental" in the sense that any benefit to religion occurs not through the direct decisions of government but through the independent choices of private persons. The University is "directly" aiding student journalism, and only "indirectly" aiding religion.[10]

The problem goes beyond mere analytical confusion. The empty formalism of *amici*'s line between money and services or facilities would have the practical consequence of enabling recalcitrant institutions to frustrate students' constitutional rights by manipulating the forms of aid. For example, a university could charge all groups a fee for use of empty classrooms, while appropriating money from the resulting fund to reimburse qualified student organizations for this cost. Under *amici*'s reasoning, religious student groups would be ineligible for the reimbursement, since it would be in the form of a "cash subsidy." In structuring its student benefits in this fashion, the university could effectively negate the students' equal access rights under *Widmar*. Although we do not suspect these

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[10] Aid in both cases is also "indirect" in a more formalistic sense: in neither case was money transferred directly from the government to a religious institution. In *Witters*, it was given to the student, and here it is paid directly to the printer.

respondents of bad faith, we note that precisely the same results have been achieved in this case. If the University provided in-house printing facilities for student publications *Wide Awake* would be entitled to equal access; but because this benefit takes the form of a "cash subsidy" for the purchase of printing services from an outside printer, petitioners are excluded. Constitutional rights should not turn on such distinctions.

3. Finally, respondents' *amici* warn that inclusion in government benefits could subvert the autonomy of religious organizations: "What government funds, government may control." Baptist Joint Comm. Br. 8. Again, petitioners entirely share the concern that the government's power of the purse not be allowed to undermine the independence of religious activity or to distort religious practice. But again, we part company on the question of how best to achieve the agreed-upon goal.[11] Respondents' *amici* commit the logical fallacy of focusing solely on the potential danger to religious autonomy from one course of action (inclusion in a neutral subsidy) without comparing it to the severe and demonstrable danger to religious autonomy presented by the alternative.

Under the Guidelines, a religiously oriented student group can obtain necessary funding for its activities only by changing its religious practices. Black Voices, the gospel music group, was told to stop "praying at practices and encouraging members to be more of a model of faith" if it wanted to continue to be eligible for funding (J.A. 73). To its credit, the group declined, and forfeited the money. According to the University's brief (at 10), *Al-Salam*, the publication of the Muslim Students Association, was warned that the religious content of its first issue might endanger its funding, and in response "the students published a second and very different issue" of the magazine. Resp. Br. 10. The second issue was exorcised of its references to the Koran, Islamic theology, and

[11] Moreover, if the payment of *Wide Awake's* printing costs threatens to subvert its autonomy, the only parties with standing to raise that claim are the petitioners.

spirituality; these were replaced by Middle Eastern recipes and discussions of world events from a secular perspective. The publication became more secular and less distinctive: the students of the University of Virginia were deprived of what had been, in the first issue, an introduction to the rich connections between Islamic religion and culture. We assume *Wide Awake* could get funding if it removed the cross from its logo, excised all Biblical references, secularized its rhetoric, and became more like every other magazine on campus. But it is difficult to see how self-censorship of this sort advances the independence of the religious sector or the pluralism and diversity of American life.

Self-censorship and reduction in diversity are the predictable consequences of the *Lemon-Hunt* approach to the Establishment Clause, which respondents' *amici* defend. Under this doctrine, a group can receive its share of public benefits only if it is not "pervasively sectarian" and if its activities are not "specifically religious." This creates a strong financial incentive for religiously oriented organizations to secularize themselves and to soften their religious witness. Thus (to use one of the examples invoked by the Baptist Joint Committee), an otherwise eligible child care facility must refrain from "any sectarian purpose or activity" if it wishes to receive federal funds. Child Care and Development Block Grant Act, 42 U.S.C. § 9858k(a). This means that it must eliminate prayers before snack, and the reading of Bible stories. Can it seriously be contended that this *protects* the independence and autonomy of religiously affiliated child care providers or the families they serve?

Jefferson noted that when the government targets aid to religion, it "tends also to corrupt the principles of that very religion it is meant to encourage, by bribing * * * those who will externally profess and conform to it." Bill for Establishing Religious Freedom, quoted at Baptist Joint Comm. Br. 6. To exclude religion from otherwise available benefits has precisely the same effect, in reverse: it "corrupt[s] the principles" of potential re-

cipients by "bribing" those who will "externally conform" to the requirement of secularism. The constitutional rule for which the *amici* argue creates an obvious incentive for religiously oriented speakers and groups to relinquish, disguise, or downplay their distinctive religious character. It is hard to square this result with *amici*'s professed concern "to protect religion from the harm that occurs when the gears of church and state are allowed to mesh." Baptist Joint Comm. Br. 5. If we want to avoid creating incentives for individuals and groups to bend their principles in response to government funding programs (whether in a religious or a secular direction), the best course is to insist that government benefits be extended on the basis of neutral, objective criteria, *without regard to the philosophical, ideological, or religious character of their speech.*

CONCLUSION

For these reasons and those stated in our opening brief, the judgment of the Court of Appeals should be reversed, and the case should be remanded with instructions to the courts below to grant petitioners' motion for summary judgment.

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